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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM MOALEM, Defendant and Appellant.	A088687 (San Mateo County Super. Ct. No. SC44317A)

On appeal from a judgment of conviction for murder, William Moalem (appellant) contends that the prosecutor improperly vouched for the credibility of witnesses, that the witnesses' plea agreements required them to lie rather than be truthful, and that he was denied effective assistance of counsel. We affirm.[1]

Background

On October 13, 1976, Richard Quilopras shot and killed Benjamin Hurwitz (the victim) after having been hired to do so by William Moalem (appellant), who was the beneficiary of an insurance policy on the victim's life.[2]

In 1976, the victim's daughter, Judy Hurwitz, managed his office and assisted him in his San Mateo podiatry practice.[3] The victim had purchased the practice from

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[1] By separate order filed this day we deny appellant's petition for writ of habeas corpus. (A096492.)

[2] Appellant and Quilopras were tried and appealed separately. We also file this day our opinion in *People v. Quilopras*, A091926.

appellant and rented offices from him. Their arrangement included a provision that the victim would see new patients and appellant would continue to see his former patients. Appellant's primary office was in San Francisco.

At some point the victim expressed dissatisfaction with the business arrangement he had with appellant. On December 5, 1975, Hurwitz agreed to purchase the office property from appellant. On January 10, 1976, appellant gave Hurwitz a written option to purchase a half interest in the building. The agreement also contained a buy/sell agreement funded by a $60,000 life insurance policy. A document dated August 24, 1976, extended the purchase option. That document also included an agreement by Hurwitz to invest $5,000 in a piece of property appellant was developing in Hillsborough. The victim obtained $2600 of the $5000 investment by cashing in a life insurance policy; the balance came from accounts receivable income. He did not borrow from loan sharks or organized crime, as appellant later alleged.

About six months before Hurwitz was murdered, appellant asked John Murphy, who knew both Hurwitz and appellant, whether Murphy knew of any hit men. Murphy told appellant he did not.

The victim's appointment book indicated that he saw Quilopras (the shooter), who had been referred to him, on August 26, 1976.

On September 20, 1976, Judy Hurwitz and the victim visited appellant's wife, Tania Moalem, and her newborn son. After the victim dropped Judy at her apartment, a shot was fired at him as he drove on Highway 92, back toward his office. The next day he showed Judy the bullet hole in his car and mentioned he had no life insurance. Quilopras failed to keep an appointment with the victim that day.

Judy Hurwitz spent the day with her father on October 13, 1976. They had an appointment for replacement of the victim's car window, which had been shattered in the September 20 shooting, but it was not replaced that day. Judy last saw her father that

afternoon. He had an appointment that night for dinner with appellant at 5:30, and a hospital staff meeting at 7:00 p.m.

The parties stipulated that Benjamin Hurwitz attended a meeting in San Francisco the night of October 13, 1976; that on his way home he was shot and murdered from a car that pulled alongside him; that the people in the car were part of a conspiracy to kill the victim; that the members of the conspiracy included Tania Moalem, Sidney Cooper, Richard Quilopras, and Dennis Agan (the driver); that the bullet that killed Hurwitz was shot from a rifle of a type to which Quilopras had access; that neither the bullet nor the rifle were recovered; that a .32 caliber bullet had been fired at Hurwitz the night of September 20, 1976, from a car that pulled alongside him, which incident Hurwitz reported to the police; that Quilopras and others had tried to kill Hurwitz on September 20; that Quilopras was convicted in 1999 of first degree murder of Hurwitz; and that Hurwitz and appellant had agreed to cross life insurance of $60,000, with each naming the other as beneficiary.

The murder was discovered on the night of October 13, 1976, when James Rader saw the victim's car stopped in the vegetation by the highway with the lights on and engine running. Rader approached the car, saw a man slumped over in the driver's seat, called out, got no response, and called 911. Firefighter Mark Lochner and others responded to the scene. The victim had no pulse and had a wound in the neck. Pathologist Dr. Peter Alfred Benson determined that the victim died of a gunshot wound in which the bullet passed through the back of the neck from left to right. The wound was consistent with having been caused by a high-powered rifle such as a 30-06, fired beyond several feet away.[4]

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[3] At the time of trial Judy Hurwitz had become a doctor of podiatry and was a post graduate resident in training in New York.

[4] "30-06" refers to the size of the bullet and the year the gun was designed. Thus, "30" refers to a bullet measuring .3 inches in diameter, and "06" refers to 1906, the year Springfield introduced this weapon.

Police interviewed appellant shortly after the murder and again on December 8, 1976. They did not tell appellant whether Hurwitz had been shot by a sniper or someone who pulled up next to his car. In the December 8 interview appellant said that on the night of the murder he had gone to a meeting in San Francisco at which Hurwitz was also present. Appellant claimed to know nothing about the real estate deal between him and the victim. He suggested that a loan shark might have been involved in the murder. During the investigation police found no evidence that the victim gambled, was a member of a right wing contingency, in a gun club, had borrowed money from loan sharks, or that he was involved with the Mafia.

Ronald Borg worked as an office manager in appellant's San Francisco office before and after the murder. He knew Dr. Hurwitz, who visited the San Francisco office occasionally, and Sidney Cooper, who visited with appellant behind closed doors approximately every couple of weeks. Cooper did not visit appellant as a patient and did not have appointments to see him.

On the morning of October 14, 1976, appellant and his wife (Tania) told Borg that Hurwitz had been shot on the San Mateo bridge by someone who had pulled alongside of him. About a week later appellant told Borg he knew Hurwitz had borrowed money from a loan shark and that was who killed him. Appellant later told newspaper writer John Horgan that he had advised Hurwitz not to join a sporting club that was actually a paramilitary group opposed to the work of Caesar Chavez.[5]

Judy Hurwitz testified that she and her father regularly went to a recreational shooting range on Thursday evenings. To her knowledge the shooting club did not have paramilitary or right wing members, and she never heard anti-Castro or anti-Caesar Chavez remarks from her father or others while there. The victim never expressed fear of enemies; he did not have a reputation as one who angered others; he did not have a gambling problem; and he never expressed any desire to join paramilitary or right wing organizations.

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5 Horgan testified his article was published on December 13, 1976.

In the years following the murder, Judy Hurwitz repeatedly asked the police to reopen the investigation. In December 1997, Sergeant Steven Archer did so after visiting with Judy at the request of his superior. Archer interviewed Tania Moalem in February 1998, when she was going through a divorce. After the interview Archer believed appellant and Tania were potential suspects because the killer or killers would have known where the victim was going to be that night. In a second conversation with Archer, Tania said she told her sons that appellant was responsible for Hurwitz's death.

Archer spoke to Sid Cooper, who acknowledged that he sold the insurance policies for appellant and Hurwitz, but denied being part of the conspiracy to kill Hurwitz. He said his company declined to pay on the Hurwitz policy, but eventually appellant was successful in collecting on it.

Archer then spoke with Tania in the hallway outside the courtroom during her 1998 divorce proceedings. She said she wanted to tell him all she knew. She stated that in 1985, appellant threatened to kill her if she did not drop divorce proceedings. Appellant explained to Tania his involvement in the Hurwitz murder and said he would go through Sid Cooper and have her killed, just as he had done with Hurwitz. Archer went to Sid Cooper and confronted him with the information Tania had initially given him. Cooper said Tania's assertions were correct and that he had acquired the shooter. Cooper said he did not receive any money for his involvement and that his motive was to inflate his ego and act like a big shot, saying, yes, he could do this. Cooper offered more information, including the name of the shooter, in exchange for immunity.

After immunity was arranged, Cooper stated he was the go-between for the contract killing. He named Quilopras as the shooter. Cooper said that Quilopras came to his office after the killing and demanded payment. Cooper called appellant, who said he would get the money and Cooper should come to his office in a few hours. Cooper received the payment from appellant in a brown paper bag and handed it directly to Quilopras. The money was later linked to a withdrawal Tania made from the couple's account at the Russian American Credit Union. Appellant, Tania, and Quilopras were arrested in August 1998. The driver, Dennis Agan was taken into custody later.

In November, while still in custody, Tania provided further information in exchange for a plea agreement and immunity.[6] She told Archer she knew of the plan to kill Hurwitz "from day one." In about January 1976, she had a conversation with appellant about killing Hurwitz. Dr. Hurwitz had become disenchanted with the practice because it was not living up to the "sales pitch" appellant had given him about it. Tania participated in the conspiracy by writing three checks for the insurance policy on Hurwitz's life. Also, when the victim was very frightened after the September 20 attempt on his life, appellant talked to Tania about the need to keep Hurwitz happy so he would not leave the practice and they could continue their plan to kill him. After the killing, on October 15, 1976, she deposited a check for $4650, and then withdrew $3,000 in cash, which she gave to appellant to give to Quilopras.

In keeping with her plea agreement, Tania testified against her former husband. Their 27-year marriage began in 1972, when she was 18 and he was 32. She knew Dr. Hurwitz for about four years, having met him through appellant. She worked in the San Francisco office, not the San Mateo office where Dr. Hurwitz practiced.

Tania described the couple's financial situation in 1975 and 1976 as "very strapped." They had problems meeting monthly expenses and received notices from creditors. In December 1975 or January 1976, appellant initiated a plan to have Dr. Hurwitz killed for financial gain. He said he would sell a portion of the San Mateo building to Dr. Hurwitz with an agreement that included a $60,000 life insurance policy, which would be handled through Sidney Cooper. Appellant and Tania would be responsible for paying the premiums. They would wait a minimum of six-to-nine months before the murder was perpetrated by one of Cooper's contacts. Tania was responsible for paying the bills at the office, and she agreed to pay the life insurance premiums.

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6 Tania was charged with murder and conspiracy to commit murder, facing a sentence of 25 years to life. She pled guilty to accessory to a conspiracy to commit murder in return for her truthful testimony and a sentence of five years probation.

Tania wrote three premium checks, the third one on August 9, 1976. Sidney Cooper had called to say the premium was due, and appellant told Tania she had to write a check for it. That day she inadvertently wrote a check for the wrong amount. (She copied the amount from a previous check stub, which reflected the lesser premium on appellant's life insurance policy, instead of the greater premium due on Hurwitz's policy.) During litigation to collect on the policy, which had lapsed because of the inadequate premium payment, Tania followed appellant's instructions and lied, stating that Cooper had told her the amount due. The matter was subsequently settled.

After the failed attempt to kill Dr. Hurwitz on September 20, 1976, Tania agreed to appellant's request that she invite the victim to their home, be nice to him and reassure him -- make him feel a part of the family. She invited Hurwitz for dinner and was nice to him, knowing he was going to be murdered. Her motive was financial gain, but also to prove her love for appellant.

Around this time appellant told Tania that Dr. Hurwitz was upset that the practice was not making as much money as he had been told it would. Tania heard Hurwitz complain to appellant that the patient load was not as great as he had been led to expect. The victim told Tania he wanted to leave the San Mateo practice. Appellant was concerned that if Hurwitz left the practice he would cancel the life insurance policy, and they would not get the money after he was killed. So, to remedy the situation, appellant then asked Hurwitz to invest in the Hillsborough real estate deal. Appellant intended to use the money Dr. Hurwitz invested in the Hillsborough property to pay his contract killer. In other words, Dr. Hurwitz was going to pay for his own killing.

Tania knew on October 13 that the victim would be killed that night, because appellant told her it would be done and that he would intentionally travel on a different freeway home from the hospital meeting to secure an alibi. The next morning when she woke up appellant told her the victim had been killed, stating it had been made to look like a drive-by shooting. On October 15 she deposited a $4650 check for appellant at the Russian American Credit Union and took $3,000 cash back for him to pay for the killing. Tania admitted lying to police during their investigation of the murder, because she was

afraid. Nor did she tell Detective Archer about her role in the crime when she spoke to him in 1998. However, prior to the 1998 investigation, in 1995 and 1996, she had told her son and stepson, her friend Sue Mondani, and attorney Doron Weinberg that appellant had his associate killed for money.

When Doron Weinberg told Tania he did not believe her, she wrote a statement about the murder to be read by her brother and taken to the police in the event of her death. She wrote the document because she feared appellant might have her killed. She showed it to her divorce attorney, Robin Krane, and then, against Krane's advice, destroyed the document because it implicated her.

As Archer's investigation progressed, Tania gradually gave him more information. She revealed that she knew about the Hurwitz murder in advance, that she wrote the premium checks and that she knew the victim was going to be killed for the life insurance proceeds. She told Archer all of this before she had reached her immunity agreement with the district attorney. Tania was arrested on August 13, 1998, and remained in jail four months pursuant to her immunity agreement.

Tania's testimony was corroborated by a number of witnesses including Doron Weinberg, Susan Mondani, and Robin Krane.

Sidney Cooper testified he owned a pawnshop from 1951 to 1963 and sold life insurance from about 1963 to about 1996. Detective Archer approached him in February 1998 and asked about the Hurwitz murder. Archer said he knew Cooper had lied to him previously and offered him immunity if he told the truth. Cooper agreed, and their agreement was memorialized on May 11, 1998, in a letter to the district attorney from Cooper's attorney.[7] Cooper understood that if he did not tell the truth he could be prosecuted for murder.

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[7] The letter stated that Cooper acted only as a "conduit," passing payment or information from one principal to another. The district attorney agreed not to prosecute Cooper for his activities and participation in the murder if Cooper gave his full and complete cooperation in the investigation and prosecution and if he told the whole and entire truth.

Cooper testified that he, Richard Quilopras, and appellant were involved in the murder of Dr. Hurwitz. Cooper had sold stolen jewelry to appellant in the 1970's and had received prescription medication from him without any examination. Also in the 1970's Cooper had used and sold cocaine, and he had done cocaine business with Quilopras.

In December 1975, appellant told Cooper, whom he had known for over 40 years, that he wanted to buy partnership insurance. Cooper at first assumed appellant wanted a "key man" insurance policy, meaning that if one partner died the other would be beneficiary in order to buy out the deceased partner's share and revert the business to the surviving partner. However, it turned out appellant wanted cross beneficiary policies, where each partner was beneficiary of the other's policy. Appellant already had $60,000 worth of insurance on his life, payable to Tania; he merely changed the beneficiary of that policy to Dr. Hurwitz. Appellant bought a new policy for Dr. Hurwitz and agreed to pay the quarterly premiums of $202. The premium on appellant's policy was less than Hurwitz's because of an age difference. In August, Cooper learned the Hurwitz policy was about to lapse, so he went to appellant's office and obtained a check from Tania which later turned out to be for an amount less than was due, and the policy lapsed. After the murder appellant sued to collect on the policy, and that suit was settled.

In 1976, four or five days after Cooper received the last check, appellant asked him if he knew anyone who would kill Hurwitz. Cooper asked why, and appellant said Hurwitz was a slob and was not bringing in business. Because Cooper was a gambler and used drugs, he knew a lot of bad individuals. He told appellant he knew someone who might do it, thinking of Quilopras, who was a bouncer in a club and collected money from people. Cooper asked Quilopras, who agreed to kill Dr. Hurwitz for $6,000. Within a few days appellant agreed to the terms, and Cooper told Quilopras to go ahead, not thinking anything would come of it.

Sometime later Quilopras told Cooper he had an appointment with Hurwitz "to look him over." Then, sometime in September, Quilopras called Cooper at his office and told him he had missed. Cooper realized the killing was going to happen and got scared.

He did not call the killing off, however, because once Quilopras had missed he would want his money; Cooper did not have the money, and appellant would not pay until Dr. Hurwitz had been killed. He did not want trouble with the police, and it did not occur to him to call them anonymously.

On October 15, 1976, Cooper read in the paper that Dr. Hurwitz and been shot and killed. Quilopras called to say he wanted his money. Cooper called appellant, who said he would have the money in a couple hours. Appellant delivered a bag of money to Cooper, who gave it to Quilopras. Quilopras said he was going to Honolulu, and that was the last Cooper saw of him for seven or eight years. Cooper testified he received no payment for his part in the transaction. He was a cocaine user with low self-esteem who just wanted to be a big shot and look like he knew everybody.

Dennis Agan drove the vehicle from which Quilopras fired both the shot in the failed attempt and the fatal shot. He testified pursuant to an immunity agreement signed on March 9, 1999, which involved the Hurwitz murder and a 1985 felony murder. Under the agreement Agan pled guilty to second degree murder, assault with intent to commit murder and accessory to murder in relation to this case and to five felony counts plus an enhancement in the 1985 case, for a total prison term of 15 years. He agreed, among other things, to fully cooperate in the investigation and prosecution of this case and to testify truthfully and completely in all proceedings.

In 1976, Agan had known Quilopras for about 25 years. They used drugs together such as cocaine, speed, angel dust, heroin, opium, LSD and alcohol. Agan had a reputation for being a good driver even while on drugs. Quilopras asked him, and he agreed, to be the driver for the Hurwitz killing. On the night of the killing Agan drove the car, with Quilopras in the front passenger seat and Robert Newman, with whom they happened to be doing a lot of drugs and drinking, in the back seat. Agan described in detail how he managed to pull up along Hurwitz's moving vehicle so that Quilopras could shoot him. After the victim's car ran off the road, Quilopras high-fived everybody. Quilopras told Agan he would be paid $1,000 within a week, but ultimately he gave him $350.

Joyce Hurwitz had been married to the victim since 1952. She was in Paris when she received the news of his death. She thought there was life insurance on the victim, because she had made premium payments. But when she inquired of appellant, he said there was nothing for her because the victim "didn't even pay his damn payments." She understood that earlier in the year the victim had cashed in the policy on which she had been making payments. She received no money from appellant after her husband's death. Nor did she receive any compensation for her husband's podiatry practice. The victim had bought the practice for $15,000 in 1975. The victim's family entered into an agreement to sell it to a Dr. Ross for $22,000 ($21,000 being for the equipment). He gave them $2,000 down payment but refused to perform the contract and asked for return of his deposit. After that he went into partnership with appellant, and the victim's equipment disappeared from the office.

In 1976, Attorney Robert Bokelman hired Dr. Moalem as an expert witness in a malpractice case for which the victim prepared some exhibits. Bokelman owed appellant $6,020 for his work and the victim $800 for his. Appellant urged quick payment, even offering to compromise the amount owed him down to $4650 if Bokelman paid quickly. This offer of compromise was highly unusual in the field. Appellant called Bokelman first thing in the morning after the murder. He said that Hurwitz had been killed; that he, appellant, was responsible for paying the Hurwitz children's bills and that he was concerned he did not have sufficient funds. He said there was an urgent need for money and he therefore asked Bokelman to pay the bills as soon as possible. Bokelman owed the victim $100 on a different matter and had a check cut for that amount, which he delivered personally to Judy Hurwitz that afternoon. The check for $4650 was written the next day, payable to appellant. Bokelman knew it was cashed but did not know by whom or whether the funds reached the Hurwitz family.

Appellant testified in his own behalf. He entered into an agreement under which Dr. Hurwitz bought the San Mateo practice for $15,000. In January 1976, they modified the agreement to give Dr. Hurwitz more of the new patients even though some were referred by Dr. Moalem's patients. The cross coverage insurance was suggested by Dr.

Moalem's lawyer's accountant, since deceased. The insurance was bought through Dr. Moalem's agent, Sid Cooper, whom he had known for many years. Sid suggested the amount of $60,000.

Appellant denied having a discussion with Tania in December 1975 or January 1976, in which either of them suggested to the other the possibility of raising cash by having Dr. Hurwitz killed for the insurance money. There was no scheme with Tania to keep Hurwitz happy; Hurwitz's practice was growing and he was enthusiastic about it.

Appellant did not believe Dr. Hurwitz was a gambler or involved with loan sharks, and he did not remember telling the police that he was. He did remember advising Dr. Hurwitz against joining a right-wing organization.

Dr. Moalem was unaware of anyone wanting to kill Dr. Hurwitz. He did not ask Sid Cooper to find someone to kill him, and he was unaware that Sid Cooper was involved in the planning of the killing. On the night of October 13, 1976, Dr. Moalem passed Dr. Hurwitz's car near Candlestick Park on the way home from the meeting in San Francisco. Late that night he learned of Dr. Hurwitz's death through their answering service and a visit from the police. He was distraught.

Dr. Moalem had to sue the insurance company to collect on his $60,000 policy on Dr. Hurwitz's life. Ultimately the case was settled for $24,000, of which he received only $10,000 due to attorney fees and costs of litigation. Appellant denied doing anything with Dr. Hurwitz's office equipment after his death or influencing Dr. Ross against purchasing the practice. Appellant denied ever seeing the checks from Attorney Bokelman. Appellant was with patients all morning on October 15, 1976. He was unaware that Tania deposited the $4650 check that day.

Appellant denied knowing Quilopras or Agan. He testified he never received a call from Sid Cooper saying he needed to be paid, and he denied giving him a bag of money. Appellant testified that in 1983 Tania revealed to him she had an affair with Cooper in 1975. When appellant confronted Cooper he indicated Tania had enticed him.

In rebuttal, several of appellant's professional colleagues and his current wife testified to his reputation for untruthfulness.

Discussion

Vouching for Credibility

Appellant contends the prosecutor improperly vouched for the credibility of Tania Moalem and Sidney Cooper through references to their immunity agreements.[8] He argues that these references constituted misconduct which deprived him of a fair trial.

Both immunity agreements were introduced in evidence and the terms were explained to the jury, including that if the witnesses breached their agreement to testify truthfully they would lose their immunity and would be subject to full criminal prosecution.

When Tania was confronted with her prior lies about the case during the investigation, she stated she now was testifying truthfully because she believed if subsequent investigation revealed she lied, she would be prosecuted for murder. When the district attorney asked Tania "[W]hy is it that your are testifying truthfully [today]?" defense counsel objected that the question assumed facts not in evidence. The court overruled the objection and the witness stated, "The only way I can protect myself now is to tell the truth about everything I know about what William [appellant] did and what I did with regard to this murder."

Similarly, Sidney Cooper testified to his understanding that if he testified truthfully he would continue to have immunity, but if he did not he would be prosecuted for murder. On cross-examination defense counsel asked Cooper who would have discretion to prosecute him for perjury, and he answered that the district attorney would. Defense counsel referred to the immunity agreement repeatedly during cross-

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[8] Dennis Agan had a similar agreement, but because he did not implicate appellant in the murder and the defense stipulated he was involved in the conspiracy, appellant states that any vouching for his testimony was harmless. Because in his separate appeal Quilopras raises a vouching issue as to Agan, we have reviewed the question as to each of the three named witnesses and conclude that as to each of them for the reasons which follow, the allegations of improper vouching are without merit.

examination. On redirect Cooper stated his understanding that to gain immunity he simply had to tell the truth.

After this testimony the court heard a motion by attorney John Keker to quash a defense subpoena. The defense sought to examine Keker about an interview the police had with his client, Tania Moalem, on November 11, 1998, in which the terms of her immunity agreement, and a testing of her credibility, were discussed. The court heard argument about whether certain conversations between Keker and Tania were privileged, and then attention turned to the "audition" aspects of the interview.

The court noted that the defense sought to show that the interview was a test and Tania had to do "sufficiently well, to the D.A.'s satisfaction, in order to get the deal that she wanted to get." At this point the district attorney cautioned, " . . . I think we are getting into dangerous grounds, to the extent that counsel is trying to argue that it's as relevant, when the District Attorney's office made a decision about Tania Moalem's credibility. [¶] . . . [¶] If that is relevant and if this evidence comes in for that purpose. . . I think . . . then we will show what the District Attorney's thought process was, in terms of making this decision about credibility. [¶] And we will get into, I assume, prosecutorial vouching, to the extent that we talk about the D.A. found this credible and this credible, and the decision had been made here rather than there. [¶] And I recognize the arguments that counsel would like to make, but it is never relevant . . . what the District Attorney's office believes, insofar as the terms of the credibility of the witness. [¶] I think that's where we start getting into troubling areas. If he gets into that side of the equation, then I should be getting into the other side, and if I do, I would be vouching. [¶] So I would submit that this is not relevant to this proceeding. What is relevant, what is, her understanding, of course, was of the plea agreement, and she testified for a whole day on that. [¶] I would think anything beyond that gets us into irrelevant dangerous areas, where the People should have a right to respond, but if we do, it will be vouching."

The court ruled that if Tania entered the interview thinking, "I need to do well here to get my deal," that would be relevant, but that how the district attorney made the

decision was irrelevant. Ultimately, after further argument and discussion, the court granted the motion to quash the subpoena.

From the above portions of the record it is clear the district attorney was well aware of the danger of vouching. He did not mention the immunity agreements in his final argument. In the defense final argument counsel attacked the credibility of prosecution witnesses Tania Moalem and Sidney Cooper. In closing the district attorney explained that a deal was made with Cooper because otherwise this 22-year-old crime would never be prosecuted. Cooper would go free if he told the truth, and therefore, the district attorney suggested, "There's no way he wasn't going to tell the truth." As to both Tania and Cooper, the district attorney argued "They both got good deals. But they lose their good deals, and get prosecuted for murder if anything they said turns out not to be true."

Appellant contends that the district attorney's references to any remarks about the immunity and plea agreements constituted improper vouching. On the contrary, the district attorney had a duty to disclose evidence relating to the credibility of material witnesses, including any inducements made to prosecution witnesses to testify. (*People v. Phillips* (1985) 41 Cal.3d 29, 46.) Where, as here, an accomplice testifies for the prosecution, "full disclosure of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting the witness's credibility." (*Id.* at p. 47; cited with approval in *People v. Fauber* (1992) 2 Cal.4th 792, 821.)

In *Fauber* the plea agreement expressly referred to the district attorney's initial determination that the witness was credible. The Supreme Court held that statement should have been excised because it amounted to a statement of the prosecutor's personal opinion that the witness was credible, and such expression carries a danger that the jurors will think the district attorney's opinion is based on information other than that adduced at trial. (*People v. Fauber, supra,* 2 Cal.4th at p. 822.)

In the case at bench appellant argues that the district attorney's signature on the immunity agreements constituted a statement by him that the stories already given by the witnesses were true. We do not agree. The district attorney made no statement which

indicated that he had special knowledge about any of the witnesses' credibility. Even if there were implications to this effect, as in *Fauber*, any error was harmless. The prosecutor argued the witnesses' credibility based on the evidence adduced at trial. "Moreover, common sense suggests that the jury will usually assume—without being told—that the prosecutor has at some point interviewed the principal witness and found his testimony believable, else he would not be testifying." (*People v. Fauber*, *supra*, 2 Cal.4th at p. 822.) Finally, as in *Fauber*, we see no possibility that appellant was prejudiced by admission of the agreements. The jury could not reasonably have understood the agreements to relieve it of the duty to decide, in the course of reaching its verdict, whether the witnesses' testimony was truthful. (*Id.* at p. 823.) Finally, the fact the jurors were instructed that they were the "sole judges of the believability" of witnesses rendered any arguable error harmless and not reversible. (*People v. Davis* (1995) 10 Cal.4th 463, 506; *Fauber, supra,* at p. 823.)

Requirement of Conforming Testimony

In a related contention, appellant argues that Tania's and Cooper's agreements defined the final version of their pretrial statements as "truthful testimony" and improperly bound them to repeat those statements at trial.[9]

It is true that a defendant is denied a fair trial if the prosecution's case depends substantially on accomplice testimony and the accomplice is placed under a strong compulsion, by the prosecution or the court, to testify in a particular fashion. Thus, if an accomplice is given immunity on condition that his or her testimony conform to a prior statement given to the police, that testimony is tainted and its admission denies the defendant a fair trial. " 'On the other hand, although there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, it is clear that an agreement requiring only that the witness testify fully and truthfully is valid.' " (*People*

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9 In his appeal Quilopras makes a similar argument as to Agan's agreement, but that claim is without merit for the reasons stated herein.

v. Sully (1991) 53 Cal.3d 1195, 1216-1217, quoting *People v. Allen* (1986) 42 Cal.3d 1222, 1251-1252 [*Allen* court's italics omitted].)

The agreements in question clearly called for the accomplices to testify fully and truthfully. Appellant's assertions to the contrary are not supported by the record.[10]

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[10] Cooper's immunity agreement, which defense counsel stressed at oral argument, was in the form of a letter from his attorney to the district attorney, which stated in relevant part as follows: "Your investigators have previously spoken with my client, Mr. Sidney Cooper, regarding his involvement in the [Hurwitz murder]. . . . Mr. Cooper wishes to cooperate with the District Attorney's Office in the investigation of this matter.

"On May 7, 1998, you asked for and received assurances from Mr. Cooper that he will, in the future, cooperate fully with your office's investigation of the murder of Dr. Hurwitz. He is willing to provide truthful statements, under oath if requested, with regard to his knowledge of the events and participants in this crime. On May 7, 1998, you asked for and received a truthful statement from Mr. Cooper that he did not commit the murder, he stated that he did not solicit the murder other than act as a 'go-between' for the other principals to the crime by facilitating contact between the parties to the murder itself. You asked for and received a truthful statement from Mr. Cooper that he did not encourage the murder of Dr. Hurwitz, other than that he acted as a conduit, passing payment or information from one principal to the other.

"You, on behalf of the District Attorney's Office, have advised my client that you will not prosecute Mr. Cooper, for his activities and participation in the murder of Dr. Hurwitz, if he, in return, gives you his full, and complete cooperation in the investigation and prosecution of this matter. Mr. Cooper agrees that he shall provide you with the whole and entire truth regarding his recollection of the events surrounding the murder. As of May 7, 1998, and henceforth, Mr. Cooper agrees that he shall testify truthfully as to these events and that you will, in the future, receive his complete cooperation and the whole and entire truth from him regarding his knowledge of the murder.

"Mr. Cooper has been advised by you, and by me as his legal counsel, that in the event he intentionally mislead [sic] or lied to you on May 7, 1998, or does not tell the whole and entire truth regarding his participation in this matter, or that if he were at any time to testify untruthfully with regard to these events, his statements may be used against him without limitation. In addition, if he testifies untruthfully, he can be, at your discretion, prosecuted for perjury.

"The specific terms under which my client shall be granted immunity for his involvement in the murder of Dr. Hurwitz by the District Attorney's Office are as follows:

"1. As long as Mr. Cooper, on May 7, 1998, and from May 7, 1998, forward, tells the District Attorney and his investigators, the entire, complete, truth, regarding his involvement and his knowledge regarding the involvement of all other participants in the

Competency of Counsel

Appellant argues that if his trial counsel's failure to object and preserve the above issues waived them for purposes of appeal, then he was deprived of effective assistance of counsel. Because we have addressed and rejected the contentions on the merits, even if counsel's performance was lacking, which we do not hold, any deficiency on counsel's part could not be shown to have been prejudicial.

The judgment is affirmed.

_____
Stein, Acting P.J.

We concur:

_____
Swager, J.

_____
Marchiano, J.

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murder of Dr. Hurwitz, the District Attorney's Office of San Mateo County will not prosecute Mr. Cooper for any of his activities that are or may be related to the murder of Dr. Hurwitz.

"2. As long as Mr. Cooper continues to cooperate with and tells the District Attorney's Office the whole and entire truth about his activities and the activities of those individuals of which he has knowledge, no statements that he provides, or any evidence that may be derived therefrom, during interviews, or any testimony he provides, shall be used against him in any criminal prosecution."

This agreement was signed by the deputy district attorney, Sidney Cooper, and his attorney, Joseph Carignan.